No. 83826-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SIMMS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Daniel Simms's sentence was increased by 11 years, for which he is not eligible for good-time credit, based upon a fact which was not alleged in any form in the Information. The Court of Appeals nonetheless affirmed the sentences imposed by creating an exception to the essential-elements rule for this type of facts. The court's opinion was premised upon the mistaken belief that cases defining the reach of the Sixth Amendment right to a jury trial also necessarily define the requirements of the essential-elements rule.

In State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III), this Court concluded the essential-elements rule requires the State allege in the Information every fact necessary to impose an enhancement. The application of the rule in Recuenco III, and prior cases defining the constitutional right to notice of facts that increase a person's sentence, do not except recidivist facts from its application. Moreover, because the State routinely alleges recidivist facts in charging documents, and did so in this case for Mr. Simms's firearm possession charge, there is no rational basis to refuse to require the same constitutional protections for a recidivist fact which substantially increases a person's sentence.

B. ISSUES PRESENTED

1. The essential-elements rule requires an Information include all facts necessary to prove an offense including enhancements. The Information alleged Mr. Simms committed the present offenses while armed with a firearm but did not allege he had previously received a firearm enhancement. Where that fact of the prior enhancement is a fact necessary to impose the present enhancement, is the essential-elements rule violated when the court doubled the firearm enhancements in the present case pursuant to RCW 9.94A.533(3)(d) based upon the court's finding that Mr. Simms had previously received a firearm enhancement?

2. The opinion of the Court of Appeals does not require the State to allege the fact that Mr. Simms was previously convicted of an offense with a deadly weapon enhancement where that fact adds 11 mandatory years to his sentence for which he cannot earn good time. However, the same fact was alleged as an a element of Mr. Simms's offense of unlawful possession of a firearm where it merely elevated that offense from a Class C to Class B felony and elevated the applicable standard range from 51 to 60 months to 87 to 116 months.[1] Where there is no rational basis to treat his same fact differently in the two scenarios, do the disparate

[1] In fact because the court imposed the low-end of the range, 87 months, the impact of the additional element was at most the addition of 27 months possible confinement.

constitutional protections afforded violate Mr. Simms's right to the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution?

C. SUMMARY OF THE CASE

Police were called to a house in North Seattle because of a fight involving a gun. When they arrived, they found two men standing over Mr. Simms and saw a large framing hammer on the floor next to Mr. Simms's head. 6/27/06 RP 79-80. Mr. Simms had suffered injuries to his head and was taken by ambulance to Harborview. 6/27/06 RP 80; 6/27/06 RP 89, 93; EX 22 and 23.

Mr. Simms told the officers that those at the house had tried to rob him and had hit him repeatedly with a hammer. 6/26/06 RP 19, 21-22

The residents of the house testified, however, that Mr. Simms had arrived with an unidentified woman to visit John Jacobs. 6/28/06 RP 35. According to Mr. Jacobs, after 15 to 20 minutes of friendly conversation Mr. Simms inexplicably drew a gun and demanded Mr. Jacobs's money. Id. at 35-37. According to Mr. Jacobs he and a friend, Ronald Cogswell, wrestled the gun from Mr. Simms. Id. After they wrestled Mr. Simms to the ground, Mr. Jacobs struck Mr. Simms in the head repeatedly with a dumbbell. 6/27/06 RP 29, 6/28/06 RP 44.

The State charged Mr. Simms with one count of first-degree robbery, two counts of second-degree assault, and one count of first-degree unlawful possession of a firearm. CP 1-3. With respect to the firearm possession count the Information alleged Mr. Simms's prior conviction. CP 3. But the Information made no mention of that prior crime in its allegations supporting the three present firearm enhancements.

Following a colloquy the court permitted Mr. Simms to waive his right to counsel and to represent himself at trial. 6/16/06 RP 2-8.

In addition to the above-described testimony, the State submitted a certified copy of Mr. Simms's prior conviction of second-degree assault with a firearm enhancement. Ex. 27. A jury convicted him as charged. CP 56-62.

At sentencing the court determined that because Mr. Simms had previously been convicted of assault with a firearm enhancement, the enhancements in this case doubled pursuant to RCW 9.94A.533(3)(d), resulting in 11 additional years of mandatory time. CP 114, 7/27/06 RP 3.

D. ARGUMENT

THE ESSENTIAL-ELEMENTS RULE AS APPLIED TO ENHANCEMENTS IN RECUENCO III REQUIRES REVERSAL OF MR. SIMMS'S FIREARM ENHANCEMENTS

1. The essential-elements rule requires the State allege in the Information every fact necessary for an enhancement. The essential elements rule requires a charging document allege the facts supporting every element of the offense and identify the crime charged. Recuenco III, 163 Wn.2d at 434. The essential-elements rule is based upon Article I, section 22 of the Washington Constitution. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008).

This rule applies to enhancements as well as substantive offenses. Recuenco III, 163 Wn.2d at 434. With respect to an enhancement the rule requires the Information allege the specific enhancement which applies and the facts necessary to establish that enhancement. Thus where a weapon enhancement is alleged the Information must specify the type of weapon enhancement and allege the facts necessary to establish it. See, Recuenco III, 163 Wn.2d at 436. Recuenco III concluded the rule was violated where the information alleged only that the defendant was armed with a "deadly weapon" as opposed to a "firearm" but the trial court nonetheless imposed the longer firearm enhancement. Because the

increase in confinement which results from the firearm as opposed to deadly weapon verdict, the State was required to allege the specific fact that supported that increase See, Recuenco III, 163 Wn.2d at 436.

Here the Information does not allege the facts necessary to support the enhancements imposed. To establish the enhancements in this case, the State was required to establish Mr. Simms was both armed with a firearm and that he had previously been convicted of an offense involving a weapon enhancement. RCW 9.94A.533(3)(d). Just as the distinction between a "deadly weapon" and a "firearm" resulted in an increase in confinement time in Recuenco III, so too a firearm enhancement where a defendant has previously been convicted of an offense with a firearm enhancement leads to a dramatic increase in confinement: double the base-level enhancement. Id. As Recuenco III concluded, the facts necessary to support that increase are subject to the essential-elements rule and must be alleged in the Information. Those facts were omitted from the Information in this case.

2. The enhancing fact at issue here cannot excluded from the requirements of the essential-element rule. In concluding the omissions in the Information did not violate the essential-elements rule, the Court of Appeals collapsed the Sixth Amendment jury-trial right with the separate constitutional requirement of notice of the facts necessary to the

punishment imposed. State v. Simms, 151 Wn.App. 677, 687-88, 214 P.3d 919 (2009) (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). However neither the essential-elements rule nor the cases applying it are based upon the right to jury trial. Instead, the essential-elements rule

> is grounded in almost identical language in the state and federal constitutions. Const. Art. I, § 22 (amend. 10); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"). It is also rooted in due process doctrines concerning notice. U.S. Const. amends. V, XIV.

State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

Quismundo reaffirmed the rule is not based upon the Sixth Amendment jury–trial right but rather:

> Under our state constitution, it is a "constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document." [State v.]Vangerpen, 125 Wn.2d [782] 788, 888 P.2d 1177 (1995). The essential elements rule recognizes a defendant's "article [I], section 22 ... right to demand the nature and cause of the accusation against him or her." Id. at 789..

164 Wn.2d at 503. Recuenco III itself makes clear its ruling is not based on a jury-trial error. The Court said:

> No error occurred in the jury's findings. In fact, it was not until Recuenco was sentenced for an enhancement that was not charged nor found by the jury that any error had

> occurred at all. Up to that point, no basis existed for Recuenco to challenge the information, and no argument is presented to us that any defect existed in the information until the sentencing judge imposed a sentence for a crime the State never charged or asked for.

163 Wn.2d at 436. Had Recuenco III concerned the right to a jury trial, its conclusion that the error was not subject to harmless-error analysis would have conflicted with the United States Supreme Court's decision in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II), remanding the case to this Court. Recuenco II plainly held Blakely errors, the violation of the jury-trial right, could be harmless. Id. at 217-18. By concluding the error in that case could never be harmless, Recuenco III necessarily recognized a violation of the essential-elements rule is a separate constitutional violation apart from simple Blakely error. See also, State v. Williams-Walker, 167 Wn.2d 889, 912, 225 P.3d 913 (2010) (Fairhurst, J., dissenting) ("In Recuenco III, there were two errors, but only one of those errors was held to not be amenable to harmless error analysis.")

The Court of Appeals concluded there was no constitutional requirement that the State provide notice of the enhancement in this case. Simms, 151 Wn.App. 687-88 (citing State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006)). But as is clear from Recuenco III, this Court has long held the State is constitutionally required to provide notice of its

intent to seek an increased sentence. See, State v. Frazier, 81 Wn.2d 628, 634, 503 P.2d 1073 (1972) (due process requires defendant receive notice of sentence fact which increase mandatory sentence); State v. Powell, 167 Wn.2d 672, 233 P.3d 493 (2009) (Stephens, J. concurring) ("I therefore agree with the dissent and would hold that the State must charge aggravating factors in the information . . . .").[2] And in requiring that notice, Recuenco III plainly drew a line between the requirements of Apprendi/Blakely and the requirements of the essential elements rule. In fact Apprendi itself refused to address the question of whether the failure to allege the enhancing fact in the charging document in that case violated a constitutional provision. 530 U.S. at 477, n.3. Thus, Apprendi is about judicial factfinding and does not address the question of notice. Because the notice requirements of the essential-elements rule give rise to separate constitutional protections than the jury-trial right at issue in Apprendi, there is no reason to rely on the later string of cases to exclude recidivist facts from the essential elements rule.

This Court has long held that the Washington Constitution mandates a defendant receive notice of facts which "cause[] the defendant to be subject to a greater punishment than would otherwise be imposed."

[2] A majority of the Court in Powell, the two concurring justices along with the three dissenting justices, agreed that notice of aggravating factors is constitutionally as well as statutorily required.

Frazier, 81 Wn.2d at 633. There is no basis to weaken that protection by adopting an exception for recidivist facts.

3. The State did not comply with the essential-elements rule.

> In this case we are dealing with a factual determination which, if determined adversely to the appellant, irrevocably forbids the court from exercising its independent judgment concerning whether the appellant is to receive a deferred or suspended sentence. The result of an adverse determination is to compel incarceration in the penal institutions for certain fixed minimum periods of time. This determination is all made prior to the imposition of final judgment and sentence. Procedural due process of the highest standard must, therefore, be afforded the appellant.

Frazier, 81 Wn.2d at 633 (citing Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967)). Those concerns are equally true here. The fact at issue adds 11 years of mandatory confinement to Mr. Simms's sentence, a term for which he is ineligible for good-time credit. The decision mandating that term is made prior to the imposition of judgment and the trial court has no discretion to alter it. RCW 9.94A.533(3)(e); State v. Brown, 139 Wn.2d 20, 28-29, 983 P.2d 608 (1999).

In fact even the State, in its brief to the Court of Appeals, acknowledged it had an obligation to provide notice of the enhancement to Mr. Simms. Brief of Respondent at 7. The State, however, contended it need only provide notice of the base level enhancement. Id. But, the State was not seeking the base-level firearm enhancement, but an enhancement

two times greater. Other than providing the State an argument by which it can defend Mr. Simms's sentence, notice of the lower enhancement is entirely ineffectual and borders on useless.

Because notice is constitutionally required, the only question remaining is notice of what. The point of providing a defendant notice of the enhancements sentence is to permit him to know prior to trial what consequences he faces. Frazier 81 Wn.2d at 634. A charging document can only accomplish that if it provides the defendant notice of the actual consequences that will follow as opposed to something else. Providing notice of an enhancement other than the one sought is a pointless exercise and cannot possible meet the constitutional standard.

Where an enhancing fact the results in an increase in the sentence, the essential-elements rule requires that fact be alleged in the information.

4. There is no rational basis upon which to except recidivist facts from the essential-elements rule for enhancements while including the very same fact within the rule where it is deemed an "element" of the crime. As is clear from the information filed in this case, the State has no difficulty alleging recidivist facts in a charging document, or even proving those facts to a jury. CP 3. The State alleged precisely the same recidivist fact with respect to the firearm possession charge. Id. There is no basis to treat that same recidivist fact differently merely because it may be termed

an element in one scenario and an enhancement in another. This is particularly true where the fact operates in precisely the same fashion in both instances, i.e., it merely increase the length of sentence which may be imposed.

In fact, its impact on the enhancement, the addition of 11 mandatory years of confinement for which good time is unavailable, is more onerous than its impact upon the possession charge, elevating the offense from a Class C to a Class B felony with an actual increase in the standard range of 27 months. It defies logic to apply the full panoply of constitutional protections to the lesser of these increases in punishment while affording no constitutional significance to the greater impact.

In his initial brief to the Court of Appeals, Mr. Simms pointed to the fact the State alleged the prior recidivist fact with respect to the unlawful possession charge but failed to allege precisely the same recidivist fact with respect to the enhancements on the other three counts. Brief of Appellant at 7-8. Mr. Simms argued

> The State can offer no rational explanation as to why it should be vested with the choice of when prior offenses will be considered an element and when it will not. There is certainly no rational explanation as to why in a single case the State should be permitted to make two divergent decisions on the very same prior offense.

Brief of Appellant at 8. Nonetheless, the Court of Appeals drew such a distinction.

That disparate treatment – the decision to deny the constitutional protections of the essential-elements rule to the very same fact in different charges - violates the Equal Protection Clause of the 14th Amendment and the similar provisions of Article I, section 12. Under the Fourteenth Amendment and Article I, section 12, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. This Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The

> classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

Mr. Simms is similarly situated with himself, as he is the person charged with the unlawful possession count and is also the person facing the doubled enhancement based upon the very same prior conviction. That same fact is treated differently in each of those settings – alleged in the information for the firearm charge and omitted for the enhancements. Thus, two questions remain. First, whether there is a reasonable basis to distinguish between the constitutional protections afforded the same fact in those two settings. Second, whether that imagined distinction rests upon a rational basis. The answer to both question is no.

In each instance the legislature has plainly and legitimately elected to punish recidivists more harshly. But that common purpose highlights rather than justifies the disparate treatment. There could be no rational basis to afford greater protections to a recidivist fact which results in relatively small increase in punishment of 27 months yet deny that same procedural protection for that same fact when it results in an increase of 11 years. The distinction cannot be justified based by an argument that persons with a prior enhancement pose a greater danger and thus longer sentences for those people should be easier to obtain. The same could be

said of an effort to eliminate the notice right for person charged with more serious offense on the belief that it will thereby be easier to obtain convictions of people with greater potential culpability. That result would plainly be intolerable and it cannot justify the denial of constitutional protections here.

State v. Roswell, concluded that for the crime of communication and similar offenses,[3] proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. 165 Wn.2d 186, 191-92, 196 P.3d 705 (2008). Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). The recidivist fact at issue here has precisely the same effect for Mr. Simms's enhancement, doubling it from 11 years to 22 years. Similarly, the recidivist fact elevates Mr. Simms's unlawful possession charge from the second degree to the first degree unlawful possession.

[3] Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

The State has defended the obvious disparity in the treatment of the recidivist fact here in similar fashions. The State argued to the Court of Appeals that the recidivist element of the unlawful possession charge differs from that in the enhancement, by contending in the former it "establishe[s] the very illegality of the behavior" whereas, according to the state, the prior conviction with an enhancement is irrelevant to imposition of the firearm enhancement in this case. Brief of Respondent at 9-10. But this distinction is neither factual nor legally correct.

First, given that it added 11 years to Mr. Simms's sentence, the existence of the prior enhancement is far from irrelevant. Second, to convict Mr. Simms of unlawful possession the state only needed to prove Mr. Simms had prior felony. By alleging he had a prior serious felony the State merely elevated the offense form the second to first degree; i.e. increased the punishment for the offense. Compare RCW 9.41.040(1)(a) and RCW 9.41.040(2)(a) (defining unlawful possession of firearm in first and second degree). In the same way, the recidivist fact in Roswell merely increased the punishment that could flow from a conviction of communicating with a minor.

The recidivist element of the enhancement is no different from the recidivist element of the unlawful possession count, or the recidivist element at issue in Roswell. In each instance, the recidivist fact is not

necessary to establish the criminal liability but simply increases the severity of the punishment. The State, by its inclusion of the recidivist fact in the firearm charge, readily accepts the conclusion that the essential-elements rule as applied to the possession charge required the State to allege the fact and nature of the prior conviction, but draws an artificial distinction with respect to the enhancement. This Court should reject the distinction.

There is no rational basis to treat the same recidivist fact differently especially where doing so provides lesser procedural protections to the circumstance in which the recidivist fact has the greatest detriment. This, Court should conclude the essential-element rule required the State to allege in the Information that Mr. Simms had previously received a weapon enhancement.

E. CONCLUSION

This Court should reverse Mr. Simms's enhancement and remand the matter for imposition of the enhancement which the State alleged in the Information.

Respectfully submitted this 7th day of May, 2010.

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Attorney for Petitioner.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent v DANIEL SIMMS, Appellant.	))))))))	SUPREME COURT NO. 83826-7

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 7thth DAY OF MAY, 2010, A COPY OF **PETITIONER'S SUPPLEMENTAL BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON, THIS 7TH DAY OF MAY, 2010

x Ann Joyce